

The dispute on appeal focuses principally on whether claimant suffered injury only to his upper extremity or whether he also suffered injury in his shoulder, and upper back or neck. Although the record clearly indicates claimant initially suffered symptoms in the shoulder and upper back, respondent contends the complaints to the shoulder and upper

back resolved leaving claimant with no permanent impairment. Immediately following injury claimant was treated at the emergency room by Dr. Mary Ann Hoffmann. Claimant presented at the emergency room with swelling and pain and deformity of his left hand and was also complaining of upper back and left shoulder pain. Dr. Hoffmann treated claimant thereafter and in January recommended work hardening, in part, because of claimant's back complaints. As of March 18, 1992 Dr. Hoffmann concluded, however, his back symptoms had resolved. Dr. Hoffmann, therefore, evaluated claimant only for disability of left upper extremity. Although she converted her rating to one to the body as a whole, she assessed no impairment rating other than that to the upper extremity.

Claimant was also evaluated by Dr. William Bailey in November of 1992. Dr. Bailey found permanent impairment to the shoulder as well as left hand, with the shoulder pain radiating into the cervical region. Claimant testified to ongoing complaints of symptoms in the shoulder and neck region from the date of accident forward. Claimant acknowledges an exacerbation of symptomatology while holding his daughter swimming in 1992. Claimant also testified that the symptoms weren't different from what he had suffered prior to the swimming incident. Dr. Bailey testified that the swimming incident did not cause any additional permanent injury to the shoulder area. Finally, claimant testified that he downplayed his neck and shoulder symptoms to Dr. Hoffmann because he hoped that he would be able to return to work for respondent. From the record as a whole the Appeals Board finds claimant did suffer injury to the shoulder and neck region and, therefore, suffered injury to the body as a whole.

The Appeals Board also finds claimant is entitled to work disability. Claimant was not permitted to return to work for respondent. Dr. Hoffmann recommended a forty (40) pound lifting restriction and recommended claimant not work with a jackhammer, shovel or posthole digger. Dr. Bailey essentially agreed with the restrictions of Dr. Hoffmann but recommended claimant not lift or carry thirty (30) pounds with his left hand. He also suggested he not run vibrating type of machinery such as a mower.

Ms. Karen Sherwood testified that, using Dr. Bailey's restriction, claimant had lost thirty-one percent (31%) of his ability to perform work in the open labor market. She also testified that using Dr. Hoffmann's or Dr. Lanny Harris' restrictions, claimant lost seventeen percent (17%) of his ability to perform work in the open labor market. The Special Administrative Law Judge chose to rely upon the opinions based upon Dr. Bailey's restrictions because Dr. Hoffmann's do not include any consideration of the injury to the shoulder. The Appeals Board agrees. The Appeals Board therefore finds claimant suffered a thirty-one percent (31%) loss of ability to perform work in the open labor market.

Ms. Sherwood projected that claimant would be able to earn between \$200 and \$260 per week. Comparing the projected post-injury wage to the pre-injury wage of \$593.47, claimant's loss of earning capability would be between fifty-six and sixty-six percent (56-66%). We find, as did the Special Administrative Law Judge, claimant has a sixty percent (60%) loss of ability to earn comparable wages. Giving equal weight to claimant's loss of ability to perform work in the open labor market and loss of ability to earn comparable wages, we find claimant has a forty-five percent (45%) permanent partial general disability.

### **AWARD**

**WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Robert G. Westgate, and against the respondent, Kansas Turnpike Authority, and the insurance carrier, Liberty Mutual Insurance Company, for an accidental injury which occurred on September 26, 1991 and based on an average weekly wage of \$593.47, for 39.71 weeks of temporary total disability compensation at the rate of \$289.00 per week in the sum of \$11,476.19 and 375.29 weeks of compensation at the rate of \$178.05 per week in the sum of \$66,820.38 for a 45% permanent partial general disability making a total award of \$78,296.57.

As of December 29, 1995 there is due and owing claimant \$11,476.19 in temporary total compensation and 182.44 weeks of permanent partial compensation at the rate of \$178.05 per week in the sum of \$32,483.44 making a total due and owing of \$44,959.63 less compensation heretofore paid.

The remaining 192.86 weeks are to be paid at the rate of \$178.05 per week until fully paid or further order of the director.

Future medical benefits will be awarded only upon proper application to and approval of the Director. Unauthorized medical expense of up to \$350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed to the respondent to be paid direct as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Appino & Achten Reporting Service Transcript of Regular Hearing	\$172.80
Braksick Reporting Service Transcript of Preliminary Hearing	\$123.60
Deposition of Karen Sherwood	\$277.60
Deposition of Mary Ann Hoffmann, M.D.	\$214.75
Deposition of Robert G. Westgate	\$ 55.00
Deposition of William A. Bailey, M.D.	\$244.50

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Eugene C. Riling, Lawrence, KS  
James C. Wright, Topeka, KS  
William F. Morrissey, Special Administrative Law Judge  
Philip S. Harness, Director